STATEMENT OF THE CASE

Petitioner contends that his Sixth and Fourteenth Amendment rights were violated when the trial court accepted a jury trial waiver that was not knowingly and intelligently made. It is respectfully submitted that a writ of certiorari to the New York Court of Appeals should issue to address the state courts' improper drawing of an inference of waiver from a silent record in contravention of the long-held view of this Court that acquiescence in the loss of fundamental rights should never be presumed.

Chautauqua County Indictment No. 02-408, filed on October 30, 2002, charged petitioner Matthew Smith with one count of rape in the first degree in violation of New York Penal Law 130.35(2), and one count of burglary in the second degree in violation of New York Penal Law 140.25(2) (Appendix ["A"] 38-39). Petitioner entered pleas of not guilty to the indictment, and a bench trial commenced in the Chautauqua County Court on January 13, 2004. In a written decision dated January 22, 2004, the Honorable John T. Ward convicted petitioner of both charged counts (A 10-11).

Petitioner thereafter filed a motion to set aside the verdict pursuant to New York Criminal Procedure Law 330.30 and 330.40. This motion was denied by the trial court and, on April 19, 2004, Judge Ward sentenced petitioner to two concurrent periods of incarceration of seven years (see certificate of conviction, A 31-32).

On his direct appeal as of right to the New York State Supreme Court, Appellate Division, Fourth Judicial Department, petitioner challenged the judgment of conviction on the ground that it was against the weight of the evidence and that it was not supported by legally sufficient evidence. Petitioner also contended that his state and federal constitutional rights were violated by a jury trial waiver process that did not ensure that he knowingly and intelligently relinquished that fundamental right.

With respect to the latter issue, a written waiver of jury trial was accepted by the trial court. This form document states, in pertinent part:

> The above-named defendant having been charged in this Court by an accusatory instrument with violating Section 130.35-02, 140.25-02 of the Rape 1st, Burglary 2nd Law of this State of New York, a felony and having been advised by the Court of his right to a jury trial thereon, after due consideration does hereby, pursuant to the provisions of Section 320.10 CPL waive his right to said jury trial and requests a trial by the Court on said charge.

(A 37).

On its face, this short document pays miserly heed to the significance of a jury trial waiver. Certainly, the form waiver does not contain advisements of the important rights that it affects–for instance, (1) that the right to a trial by jury is a constitutional right; (2) that by waiving a jury, the accused is forfeiting the

right to require the prosecutor to convince twelve jurors of guilt beyond a reasonable doubt; (3) that a jury verdict must be unanimous, and the waiver removes from the prosecution the burden of persuading all twelve jurors; (4) that no one may force or threaten an accused into giving up his right to a jury trial and that no one may promise him something in return for doing so; (5) that the accused may personally participate in the selection of the jury; and (6) that an accused should surrender such an important right only after full consultation with his attorney.

Moreover, the trial court's inquiry into the waiver in petitioner's case did not compensate for the waiver form's obvious inadequacies. The two-page transcript of the very brief court appearance concerning the jury trial waiver reveals that the court never engaged petitioner in any discussion concerning his right to a jury trial, preferring instead to make a single inquiry of counsel concerning whether he had discussed the waiver with his client (A 35-36). The court did not mention any of the salient considerations involved in deciding whether to waive the critically important jury trial right, and did not question petitioner concerning his knowledge and understanding of the rights he was surrendering by entering into the waiver. Petitioner was not even asked whether he understood any discussion he may have had with his attorney concerning the waiver (A 35-36).

In a memorandum and order dated March 18, 2005, a majority of the Appellate Division affirmed petitioner's conviction. While the court expressly

rejected the weight of the evidence and legal sufficiency of the evidence arguments, it did not explain why it rejected petitioner's challenge to the validity of the jury trial waiver (A 4-6).

However, the Honorable Samuel L. Green dissented, concluding that the conviction was against the weight of the evidence because the complainant's claim that she did not have the capacity to consent to sexual intercourse because she was sleeping were not credible (A 6-7). Further, Justice Green found that the waiver of jury trial was not executed in open court as required by state law, and also that the record demonstrated that the flawed and inadequate process employed by the trial court in enforcing a waiver of petitioner's right to a jury trial did not ensure that petitioner waived that right knowingly and with informed judgment (A 7-8).

Justice Green granted petitioner's application for leave to appeal to the New York Court of Appeals pursuant to Criminal Procedure Law 460.20 (A 4-5). After hearing oral argument of the case, the Court of Appeals issued a memorandum and decision on March 30, 2006, affirming the decision of the Appellate Division (A 1-3). Despite the absence of any colloquy involving petitioner, the court concluded that the waiver of jury trial was knowing, intelligent, and voluntary, explaining:

> . . . in defendant's presence the trial court inquired of defendant's counsel concerning his client's understanding of the rights waived. Although an allocution by the trial judge eliciting defendant's full

> understanding of the importance of the right being waived would have been better practice, no particular catechism is required to establish the validity of a jury trial waiver. The inquiry here, though minimal, was sufficient to establish that defendant understood the ramifications of such waiver.

(A 2; citation omitted).

By accepting a jury trial waiver where there was no allocution of the defendant and no record from which anyone could reasonably conclude that such a waiver was made knowingly and intelligently, the Court of Appeals essentially ruled that a trial court need not ever evaluate an accused's knowledge and understanding of the rights affected by a jury trial waiver. Petitioner contends that this standard is wholly inadequate under the United States Constitution.

A WRIT OF CERTIORARI SHOULD BE GRANTED ON THE QUESTION OF WHETHER PETITIONER'S WAIVER OF HIS RIGHT TO A JURY TRIAL SATISFIED MINIMUM FEDERAL CONSTITUTIONAL STANDARDS

This Court has emphasized that "the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would apply *in general* in the circumstances–even though the defendant may not know the *specific detailed* consequences of invoking it." *United States v. Ruiz*, 536 U.S. 622, 629, 122 S. Ct. 2450 (2002) (emphasis in original). While an accused generally cannot complain that he did not anticipate every ramification of a waiver no matter how insignificant, he is entitled to know of the "relevant circumstances and likely consequences" of the waiver. *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463 (1970); *see also, Iowa v. Tovar*, 541 U.S. 77, 92, 124 S. Ct. 1379 (2004).

In the case at bar, the dissenting justice at the intermediate state appellate court has the right of it: the record does not demonstrate that petitioner knowingly and intelligently waived his right to a trial by jury. Accordingly, petitioner respectfully requests that the Court grant his petition for a writ of certiorari to the New York Court of Appeals for the purpose of establishing that the flawed jury trial waiver acceptance process approved by that court does not comport with minimum constitutional requirements for the protection of criminal defendants, and that the

resulting record does not show that his jury trial waiver was made knowingly and intelligently.

A. The Decision of the New York Court of Appeals Conflicts With Decisions of the Supreme Court and the High Courts of Other States Concerning the Propriety of Waivers of Fundamental Rights.

The right of an accused to a trial by jury not only must "be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective . . . the sanction of the court must be had, *in addition to the express and intelligent consent of the defendant.*" *Patton v. United States*, 281 U.S. 276, 312, 50 S. Ct. 253 (1930) (emphasis added) (note that *Patton* may have been overruled *sub silentio* on other grounds in *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893 (1970)); *see also, Singer v. United States*, 380 U.S. 24, 34, 85 S. Ct. 783 (1965). The question of whether or not "there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 278, 63 S. Ct. 236 (1942). Since one of the critical functions of the jury is to operate as a bulwark against oppression by the Government, *Duncan v. Louisiana*, 391 U.S. 145, 155, 88 S. Ct. 1444 (1968), the validity of a contested jury trial waiver necessarily turns on how well a state's judicially approved waiver process protects the fundamental constitutional rights of the accused. Petitioner respectfully contends that the jury trial waiver process approved by the New York Court of Appeals improperly relieves New York trial courts of the obligation to ensure, on the record, that a criminal defendant's waiver of his right to be tried by a jury is the product of an intelligent and informed

choice.

In petitioner's case, the only circumstances pertinent to the jury trial waiver are (1) a form jury waiver document containing his signature, and (2) the court's single question to trial counsel regarding whether he had discussed the waiver with his client (A 35, 37). This meager record allows the People to state just these two facts, and it simply does not provide grounds on which to find a knowing, intelligent, and self-protecting waiver of petitioner's right to a jury trial. *Adams v. United States ex rel. McCann, supra.* In his dissent at the Appellate Division, Justice Green recognized that the waiver document and the colloquy between the court and defense counsel did not allow even an inference that petitioner's waiver was the result of an intelligent, informed judgment (A 7-8). Even the New York Court of Appeals had little choice but to acknowledge that "an allocution by the trial judge eliciting defendant's full understanding of the importance of the right being waived would have been better practice"–a remark that is true, but still falls short of the mark set by the Sixth and Fourteenth Amendments (A 2). An allocution of the accused concerning his understanding of the precious right he is waiving is not just "better practice," it is essential to ensuring that the defendant truly knows the significance and likely ramifications of his decision to proceed with a bench trial rather than have his fate decided by a jury of twelve peers.

Indeed, an allocution requirement is entirely consistent with this Court's long-standing admonition that "we 'do not presume acquiescence in the loss of fundamental rights.'" *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019 (1938) (where the Court observed in regard to a challenged waiver of the right to counsel that a waiver "is ordinarily an intentional relinquishment or abandonment *of a known right* or privilege"). Consequently, the courts should "indulge every reasonable presumption against waiver." *Barker v. Wingo*, 407 U.S. 514, 525, 92 S. Ct. 2182 (1972). Asking a trial court to actually address the accused himself, however briefly, to determine the state of his understanding of the "relevant circumstances and likely consequences," *Brady v. United States, supra*, of a waiver of Sixth Amendment rights cannot reasonably be characterized as imposing an unreasonable burden on the court or as an interference with state court procedures beyond what is minimally necessary to protect a defendant's federal constitutional rights.

Several state high courts have mandated that the trial courts in their respective states conduct on-the-record colloquys of defendants intending to waive jury trials to provide assurance that the defendants recognize what is involved in making such a decision. *See, e.g., State v. Anderson*, 249 Wis.2d 586, 590-91, 638 N.W.2d 301 (2002) ("Furthermore, recognizing that a jury trial involves a fundamental right, we mandate the use of a personal colloquy in every case where a criminal defendant seeks to waive his or her right to a jury trial"); *see also, Abeokuto v. State*, 893 A.2d 1018, 1036 (Md., 2006) (where the Maryland Court of Appeals rejected a jury trial waiver challenge, explaining that the trial court had complied with Maryland's statutory

requirement that it examine the defendant on the record in open court to establish that the waiver was knowing and voluntary, and that the court, the prosecutor, and defense counsel all discussed the jury trial process in detail with the defendant); *State v. Ross*, 472 N.W.2d 651, 654 (Minn., 1991) (citations omitted) ("The purpose of the trial court's colloquy with the defendant is to learn whether the defendant's waiver is knowingly and voluntarily made. The focus of the inquiry is on whether the defendant understands the basic elements of a jury trial").

Regardless of whether an allocution is required, the record regarding the jury trial waiver in petitioner's case is silent regarding the important considerations at the heart of a decision to waive a constitutional right of such significance. In order to have intentionally surrendered his right to a jury trial, petitioner must have at least known what that right essentially encompassed (but not necessarily that petitioner had a right to understand insignificant minutiae prior to executing a jury trial waiver-a claim petitioner does not make). *See, e.g., Commonwealth v. O'Donnell*, 559 Pa. 320, 337, 740 A.2d 198 (1999) ("the law is that a voluntary waiver of a trial by jury will be found to be knowing and intelligent when the on-record colloquy indicates that the defendant knew the essential ingredients of a jury trial which are necessary to understand the significance of the right being waived"). There is no proof in the instant case that petitioner, in the midst of his first involvement in the criminal justice system, understood the consequences of the waiver.

Here, we do not have even an inkling of petitioner's understanding (1) of the constitutional stature of the right to a trial by jury; (2) that by waiving a jury petitioner forfeited the right to require the prosecutor to convince twelve jurors of guilt beyond a reasonable doubt; (3) that a jury verdict must be unanimous, and that the waiver relieves the prosecution of the significant burden of persuading all twelve jurors of guilt beyond a reasonable doubt; (4) that no one may force or threaten or pressure him into giving up his jury trial right, and that no one may promise him anything in return for doing so (e.g, that the trial court will be more favorably disposed towards him or more lenient to him if he tries the case without a jury); (5) that he is entitled to personally participate in the selection of the jury, and (6) that he is entitled to a full opportunity to consult with his attorney about the intricacies and consequences of a jury trial waiver (instead of, for instance, being allotted insufficient time in a courthouse hallway or holding area to analyze the issue and make his decision). As the Supreme Court of Wisconsin emphasized in *State v. Anderson, supra,* the waiver process must demonstrate that the accused is aware of certain salient considerations involved in waiving a jury in favor of a bench trial:

> To prove a valid jury trial waiver, the circuit court *must conduct a colloquy* designed to ensure that the defendant: (1) made a deliberate choice, absent threats or promises, to proceed without a jury trial; (2) was aware of the nature of a jury trial, such that it consists of a panel of 12 people that must agree on all elements of the crime charged; (3) was aware of the nature of a court trial, such that the judge will make a decision on whether or not he or she is guilty of the crime charged; and (4) had enough time to discuss this decision with his or her attorney. As with other constitutional rights, "If the circuit court fails to conduct a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver . . ."

249 Wis.2d at 603, 638 N.W.2d 301 (emphasis added; citations omitted).

Despite not having this important information or even sufficient facts from which petitioner's understanding of the waiver could reasonably be inferred, the New York appellate courts rejected petitioner's constitutional challenges. Petitioner submits that his case was decided on precisely the "silent record" that the Supreme Court has warned cannot be the basis for presuming that an accused waived fundamental rights. As this Court observed in *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709 (1969):

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot presume a waiver of these three important federal rights from a silent record.

Id. at 243, 89 S. Ct. 1709 (citations and footnote omitted); *see also, Parke v. Raley*, 506 U.S. 20, 30, 113 S. Ct. 517 (1992) (where the Court rejected Raley's challenge to state court proceedings regarding the use of prior convictions, noting that "[t]here is no good reason to suspend the presumption of regularity here. This is not a case where the extant transcript is suspiciously 'silent' on the question of whether the defendant waived constitutional rights").

There is good reason to suspend the presumption of regularity attaching to the state court proceedings in petitioner's case. The record below *is* suspiciously silent on important questions regarding whether petitioner's waiver of his Sixth Amendment right to a trial by jury was made knowingly and understandingly. Defense counsel's lone representation that he had discussed the matter with his client is not sufficient to establish that petitioner's waiver was the product of a choice that was informed by knowledge of the important characteristics of jury trials, *see, e.g., Martinez v. State*, 309 Md. 124, 133, 522 A.2d 950 (1987) (the colloquy with a defendant

concerning his jury trial waiver must occur on-the-record, and the responses must come from the defendant himself")—especially where both the written waiver and the transcript of the waiver proceedings are silent on these important issues.

The New York Court of Appeals failed to indulge every reasonable presumption against waiver, *Barker v. Wingo, supra,* and its conclusion that the "minimal" inquiry made by the trial court *of defense counsel* to ascertain whether petitioner understood the ramifications of the waiver placed the state high court's imprimatur on a waiver process that is wholly inadequate under the Sixth Amendment and the Supreme Court's rulings in this area.

CONCLUSION

Accordingly, petitioner respectfully requests that this Court grant a writ of certiorari to the New York Court of Appeals, and that the Court grant such other and further relief as it deems just and necessary.

Respectfully submitted,

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